JOHN LYNN BROUGH

IBLA 77-355 Decided November 25, 1977

Appeal from decision of Utah State Office, Bureau of Land Management rejecting application for reinstatement of canceled stock-raising homestead entry, SL-050163.

Affirmed.

1. Rules of Practice: Appeals: Res Judicata

The doctrine of finality of administrative action, counterpart of res judicata, designed to achieve orderliness in the administration of public lands, bars reconsideration of a 1936 General Land Office decision, rendered according to procedures then in effect, which canceled a stock-raising homestead entry and from which no appeal was taken.

APPEARANCES: John Lynn Brough, pro se.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

John Lynn Brough appeals from a decision dated April 29, 1977, of the Utah State Office, Bureau of Land Management (BLM), rejecting his application for reinstatement of canceled stock-raising homestead entry SL-050163.

The appellant alleges he is the son and sole surviving heir of Mac Brough, who filed the above entry on October 6, 1931, pursuant to the Stock-Raising Homestead Act of December 29, 1916, 43 U.S.C. § 291 et seq. (1970). 1/ The application was filed on Land Office Form 4-016 (February 18, 1921) for lots 3, 4, 5, 6, 13, 14, 15, 22, 23, 24, 31, 32, 33, sec. 19 and lots 5, 6, 7, sec. 30, T. 14 S., R. 1 W., Salt Lake Meridian, containing 640 acres. On May 5, 1932, Mac Brough was sent Notice of Allowance of his application.

1/ Section 702 of the Federal Land Policy and Management Act of October 21, 1976, P.L. 94-579, repealed the Stock-Raising Homestead Act.

Under the homestead laws an entryman was required to establish a permanent residence upon the land. The Stock-Raising Homestead Act, 43 U.S.C. § 293, specifically required permanent improvements tending to increase the value of the land for stock-raising purposes, one-half of such improvements to be made within 3 years after the date of entry.

On March 16 and 17, 1936, one N. J. Fibush, Special Agent, Division of Investigations, Department of the Interior, investigated the above entry. He filed a report stating that the entryman had failed to establish residence, had not made improvements, and had not used the land for grazing. Based on the Fibush report, the Register of the District Land Office, Salt Lake City, on July 28, 1936, issued a contest complaint against Mac Brough with the following charges:

> 1. That the entryman has not established and maintained his residence upon the lands.
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> 2. That the entryman has not, during the three years and more that have elapsed since the date of the entry, placed permanent improvements on the lands tending to increase their value for stock-raising purposes, to the value of at least $ 1.25 an acre, as required by the law under which the entry was made.

Mac Brough was advised that the entry would be subject to cancellation unless he made an answer or applied for a hearing within 30 days of service of the notice. The record contains a return receipt card, date of delivery stamped "August 18, 1936," signed by Mac Brough. On October 27, 1936, the entryman having failed to deny the charges or request a hearing, the Acting Register of the Land Office recommended cancellation of the entry. Notice thereof was sent to the entryman and received by him on October 29, 1936, as evidenced by return receipt card. On December 8, 1936, default of the claimant Brough, following proper notice, was taken as an admission of the truth of the charges; the entry was canceled and the case closed by the Assistant Commissioner of the General Land Office.

On June 16, 1976, appellant herein petitioned the Utah State Director, BLM, to consider reinstatement of the canceled entry, alleging that his father, who died in April 1976, had complied with the homestead laws and had never been notified of the cancellation.

The State Director obtained the homestead file from the Archives. After review he found it reflected that Mac Brough had not lived on the property, had made no improvements thereon, had failed to answer the notices of adverse proceedings, and had failed to make an appeal. Accordingly, the State Director concluded that the entry was properly canceled and the case closed in 1936.

Appellant also wrote to his representative in the United State Congress alleging that his father was the victim of a great injustice. The State Director's office duly responded to congressional inquiries, diligently pointing out the crucial facts as contained in the official file on which cancellation of the entry was based.

On March 17, 1977, appellant herein again petitioned the Utah State Office for reinstatement of his father's canceled entry. With the application, appellant submitted copies of three letters. One of these, dated August 23, 1936, was addressed to the Land Office, Salt Lake City, and signed by Mac Brough. Its text is as follows:

> Sir,
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> As you know my homestead was given to me on May 5, 1932. I have tried to do my best on improving the ground and I have stayed on it. I was told that I have 5 years to complete the work. That would give me until May 5, 1937. I don't know where you got the information that I haven't done any work or lived out there. I feel that I have lived up to my end of the agreement. I ask you to wait until May 5, 1937 and then have somebody look at my land and they will see more improvement by then.

Two further letters, dated October 4 and December 2, 1936, were written to the Land Office by Mac Brough's father. The substance of these letters was a request to the Land Office to send someone to make a field inspection of the homestead. None of these letters are contained in the official Mac Brough file.

In its decision denying reinstatement, the BLM again reviewed all of the facts upon which the 1936 decision canceling the entry was based. The BLM stated, with reference to the letters presented by appellant, that it was limited to the evidence of record when considering the correctness of a previous decision. It denied the appellant's petition on the ground that no compelling legal or equitable reasons had been submitted to warrant the relief sought.

On appeal to this Board, John Lynn Brough maintains that the 1936 cancellation of his father's homestead "was improper and violated the then existing law, regulations and procedures." He asserts that the report of Special Agent Fibush, on which this action was based, lacked credibility and was flawed with improprieties. Appellant also asserts that the BLM, in its April 29, 1977, decision ignored relevant evidence and failed objectively to evaluate his petition for reinstatement of the canceled homestead entry. Submitted for the first time on appeal is the photostatic copy of a September 1934 photograph, purportedly depicting a dwelling house on the Mac Brough homestead.

[1] The regulations in effect at the time of cancellation of the Mac Brough homestead entry were set forth in Departmental Circular No. 460, entitled "Manner of Proceeding in Contests Initiated upon a Report by a Representative of the General Land Office." This circular is reprinted on the reverse side of the contest notice, which was received by appellant's father on August 18, 1936. The first three paragraphs of the circular are as follows:

> 1. The purpose hereof is to secure speedy action upon claims to the public lands, and to allow claimant, entryman, or other claimant of record, opportunity to file a denial of the charges against the entry or claim, and to be heard thereon if he so desires.
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> 2. Upon receipt of a report this office will consider the same and determine therefrom whether the facts stated, if true, would warrant the rejection or cancellation of the entry or claim.
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> 3. Should the charges, if not disputed, justify the rejection or cancellation of the entry or claim the local officers will be duly notified thereof and directed to issue notice of such charges in the manner and form hereinafter provided for, which notice must be served upon the entrymen and other parties in interest shown to be entitled to notice.

As was stated in Gabbs Exploration Company, 67 I.D. 160 (1960), at 165, aff'd. Gabbs Exploration Company v. Udall, 315 F.2d 37 (D.C. Cir. 1963) cert. denied 375 U.S. 822 (1963), "[t]hese provisions indicate that before a contest based on a report by a representative of the General Land Office was initiated, a determination was made that the facts reported concerning an entry or claim, if true, would warrant the cancellation of the entry or claim as would the failure to dispute the charges." The issuance of the contest notice to appellant's father necessarily implies that the Commissioner of the General Land Office had determined the sufficiency of these charges.

Paragraph 10 in the circular provides that if the claimant fails to deny the charges, fails to apply for a hearing, or to submit a statement of facts rendering the charges immaterial, or to appear at a hearing ordered without good cause, such failure will be taken as an admission of the truth of the charges and will obviate the necessity for the Government submitting evidence in support thereof. The same paragraph also states that in cases finally closed upon default of the claimant, if application to reopen any case is filed with the register and receiver, they will forward it with recommendation to the General Land Office. Accordingly, appellant's father had notice that a failure to deny the charges would be taken as an admission

of their truth and that if the contest were closed upon default, further action was possible by filing an application to reopen the case. Appellant's father, however, failed to take either of the available steps. The record reflects that appellant's father defaulted with respect to the contest charges and took no appeal from the decision canceling his entry. In Gabbs Exploration Company, supra, a claimant who received notice of adverse charges against his claims, failed to answer the charges as required and failed to appeal from a decision holding his claim null and void, taking no action thereon for 25 years. We find the Deputy Solicitor's rationale in that case applicable here, and we quote it in pertinent part:

> [The claimant] * * * had notice and an opportunity to be heard and to defend his interest within the requirements of due process and the consequence of his failure to participate in a determination of the validity of the claims cannot now be avoided by asserting lack of due process in the 1930 proceedings (American Surety Co. v. Baldwin et al., 287 U.S. 156, 169 (1932); see Cameron v. United States, 252 U.S. 450, 460, 461 (1920)).
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> [The claimant's] * * * failure to appeal from the ruling that his claims were null and void, even if the decision was erroneous, bars him, or anyone claiming under him, from questioning the correctness of the decision almost 30 years after the right to appeal therefrom expired (see Charles D. Edmonson et al., 61 I.D. 355 (1954), and cases cited therein).

(67 I.D. at 165).

It is remarkable, in the instant case, that appellant's father, in the 40 years after cancellation of his entry, never asserted an interest therein nor alleged an injustice. It was only after the entryman's death in 1976, that his son, appellant herein, began to petition for a reopening of the case. The passage of so much time however, militates against renewed consideration of the correctness of the original decision. That decision, it must be emphasized, resulted procedurally because of the entryman's failure to take action, not because of the proven correctness of the facts known to the General Land Office at the time.

In Union Oil Company of California, 71 I.D. 169 (1964), the Solicitor states as follows with respect to res judicata (177):

> The doctrine of res judicata, as applied in administrative decisions by this Department, is designed to achieve orderliness in the administration of the public

> lands as well as finality of decisions which have been closed finally and have not been appealed or otherwise attacked. Every reason of policy which supports the doctrine in the courts is applicable here. There must be an end to administrative litigation also. Public rights as well as private cannot be indefinitely suspended because further litigation may someday be initiated.

The doctrine of finality of administrative action is applicable here and bars further consideration of the December 8, 1936, decision canceling Mac Brough's stock-raising homestead entry. John W. Roth, 8 IBLA 39 (1972). Accordingly, the BLM properly denied reinstatement of the canceled entry in its decision of April 29, 1977.

Therefore pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Anne Poindexter Lewis
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

Douglas E. Henriques
Administrative Judge